No. 85-1160

Supreme Court, U.S.
FILED
JAN 8 1986
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CLERK

In The

Supreme Court of the United States

October Term, 1985

ANGELINA SINICROPI,

Petitioner,

vs.

ROBERT J. BENNETT, as Deputy Director of Probation of the County of Nassau and COUNTY OF NASSAU,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS, STATE OF NEW YORK

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QUESTION PRESENTED

When an administrative adjudicator in a public employee disciplinary proceeding conducts an *ex parte* examination of witnesses without the knowledge or consent of the public employee who is entitled to constitutional due process of law, does such examination violate constitutional due process of law, notwithstanding a finding of substantial evidence in the record to support a determination terminating the public employee.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS, STATE OF NEW YORK

OPINION BELOW

The opinion of the New York Court of Appeals, State of New York dated October 10, 1985 appears in the Appendix at 1a.

JURISDICTION

The judgment to be reviewed was dated and entered October

10, 1985. The statutory provision believed to confer jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §2103.

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved is Section 1 of Article XIV which provides in relevant part that

> "No State shall . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner was an employee of respondent, County of Nassau. After a disciplinary proceeding subject to New York State statutory provisions and constitutional due process of law, she was terminated on June 20, 1978. This termination was annulled on procedural grounds in part because an *ex parte* examination of her personnel record was held without her knowledge or consent and because the administrative adjudicator was also personally involved in the events. *Sinicropi v. Milone*, 80 A.D. 2d 609 (N.Y. 1978). Upon the appointment of a new administrative adjudicator, she was again terminated on July 21, 1981. The same hearing and hearing officer's report and recommendations were used for both terminations. This latter termination was reviewed under Article 78 of the New York Civil Practice Law and Rules. This procedure is used to review administrative determinations but does not provide for any discovery procedures. This termination was sustained as being based upon substantial evidence. *Sinicropi v. Bennett*, 92 A.D. 2d 309, *aff'd*, 60 N.Y. 2d 918.

At an examination before trial in a federal action taken on March 20, 1984, petitioner discovered for the first time that the

administrative adjudicator, Robert Bennett, had conducted an *ex parte* examination of witnesses without the knowledge or consent of the petitioner.

An action was commenced to annul respondent's determination of July 21, 1981 (8a). Paragraphs 9 and 10 of the petition raised the constitutional due process issue which is the subject of this petition for a writ of certiorari. The trial court dismissed the petition on the grounds of *res judicata* but the Appellate Division held that the *ex parte* examination was harmless error. The New York Court of Appeals dismissed the appeal as raising no substantial constitutional question.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the allowance of the writ of certiorari are that; (1) the question of constitutional law raised by this case is important; (2) there is a conflict between court decisions on this issue; and (3) this Court has not issued any decisions concerning *ex parte* examinations of witnesses and procedural due process requirements relating thereto.

In *Board of Regents v. Roth*, 408 U.S. 564, this Court held that procedural due process applied to termination proceedings of permanently appointed public employees such as the petitioner. In 1950, a public employee in California had his termination annulled when the administrative adjudicator conducted an *ex parte* examination of a witness without the knowledge or consent of the public employee. This determination was made notwithstanding substantial evidence in the record to support the termination. While this decision was based upon statutory requirements for a fair hearing, it has been cited to support the same standard under constitutional due process, *Brown-Pacific-Maxon Co. v. Toner*, 255 F. 2d 611 (7th Cir. 1958).

The New York determination in this case is in conflict with those of California and the Seventh Circuit Court of Appeals. While New York permits a finding of harmless error when there is substantial evidence to support the administrative determination made after an *ex parte* examination of witnesses without the knowledge or consent of an interested party, the other two jurisdictions do not. These latter jurisdictions hold that such examination is a fundamental error violating constitutional due process so as to require an annulment of the determination without a finding of prejudice.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM D. FRIEDMAN
Attorney for Petitioner

APPENDIX A—ORDER OF STATE OF NEW YORK, COURT OF APPEALS

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of October A.D. 1985

PRESENT, HON. SOL WACHTLER, *Chief Judge, presiding*

2 Mo. No. 1030 SSD 130

In the Matter of Angelina Sinicropi,

Appellant,

vs.

Robert J. Bennett, as Deputy Director of Probation of the County of Nassau, & ano.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

APPENDIX B—DECISION

LEON D. LAZER, J.P.
GUY J. MANGANO
FRANK D. O'CONNOR
RICHARD A. BROWN, JJ.

111 AD2d 801 A - April 22, 1985

324 E Angelina Sinicropi, appellant, v. Robert J. Bennett, etc., et al., respondents.

William D. Friedman, Hempstead, N.Y., for appellant.

Edward G. McCabe, County Attorney, Mineola, N.Y. (Robert O. Boyhan of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination by respondents dated July 21, 1981, which, after a hearing, terminated petitioner's employment with the Nassau County Probation Department, the appeal is from a judgment of the Supreme Court, Nassau County (Roncallo, J.), dated September 25, 1984, which dismissed the petition.

Judgment affirmed, with costs.

Both this court and the Court of Appeals have previously determined that there was substantial evidence supporting respondents' determination, within the four corners of the record. The issues raised by petitioner in the instant proceeding do not change this result. Therefore, the petition was properly dismissed (*see, Sinicropi v. Bennett*, 92 AD2d 309, *affd* 60 NY2d 918).

Appendix B

LAZER, J.P., MANGANO, O'CONNOR and BROWN, JJ., concur.

June 10, 1985 SINICROPI v BENNETT 324 E

APPENDIX C—ORDER ON APPEAL FROM JUDGMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 10, 1985.

HON. LEON D. LAZER, Justice Presiding,
HON. GUY J. MANGANO,
HON. FRANK D. O'CONNOR,
HON. RICHARD A. BROWN. *Associate Justices*

Angelina Sinicropi,

Appellant,

v

Robert J. Bennett, etc., et al.,

Respondents.

ORDER ON APPEAL FROM JUDGMENT

In the above entitled cause, a proceeding pursuant to CPLR article 78 to review a determination by respondents, dated July 21, 1981, which, after a hearing, terminated petitioner's employment with the Nassau County Probation Department, the above named Angelina Sinicropi, petitioner, having appealed to this court from a judgment of the Supreme Court, Nassau County, dated September 25, 1984, which dismissed the petition; and the said appeal having been argued by William D. Friedman, Esq., of counsel for the appellant and argued by Robert O. Boyhan, Esq., of counsel for the respondent, due deliberation having been

Appendix C

had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, with costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

APPENDIX D—ORDER APPEALED FROM

SUPREME COURT — STATE OF NEW YORK

Present:

HON. ANGELO D. RONCALLO
Justice

SPECIAL TERM, PART I
NASSAU COUNTY

INDEX NUMBER 10904, 1984

MOTION DATE August 23, 1984

MOTION CAL. NUMBER 179

TRIAL CAL. NUMBER

ANGELINA SINICROPI,

Petitioner

-against-

ROBERT J. BENNETT, as Deputy Director of Probation of the County of Nassau and COUNTY OF NASSAU,

Respondents.

The following papers numbered 1 to ____ read on this motion____

PAPERS
NUMBERED

Notice of Motion/Order to Show Cause .....

Appendix D

Answering Affidavits .....
Replying Affidavits .....
Pleadings—Exhibits—Stipulation .....
Briefs: Plaintiff's/Petitioner's____Defendant's/Respondent's____

Upon the foregoing papers it is ordered that this petition is dismissed; respondents' determination to terminate petitioner's employment has been reviewed by the Appellate Division and the Court of Appeals; petitioner has exhausted her judicial remedies and is precluded from any further review.

Dated Sept. 25, 1984 s/ Angelo D. Roncallo

J.S.C.

APPENDIX E—EXCERPTS OF PETITION TO ANNUL RESPONDENT'S DETERMINATION OF JULY 21, 1981 WITH EXHIBIT ATTACHED

9. During the said examination, respondent Bennett admitted that he used matters that were not in the original hearing record in reaching his determination to terminate the petitioner; to wit; he spoke to witnesses about their testimony at said hearing without the knowledge of or presence of the petitioner. A copy of said examination as signed by respondent Bennett was given to petitioner on or about May 17, 1984. The relevant parts of said examination are Exhibit VI.

10. The said actions of respondent Bennett in making his determination without notifying petitioner or giving her an opportunity to be heard with respect to said examinations of witnesses is in violation of the disciplinary proceeding provided for by Section 75 of the Civil Service Law, the said court order and is in violation of said due process protection of petitioner.

EXHIBIT—EXCERPT OF ROBERT J. BENNETT EBT

Q. I'm trying to find out the source of where you—you know these complaints came to you. Did they come as a result of reading the disciplinary proceeding or did they come as a result of being the deputy director in the ordinary course of business. That's what I'm really trying to determine. A. That might have come up during the period of time that I was reading the transcript. At the time I was looking over the records.

Appendix E

Q. But you're not certain? A. I'm not certain, Bill.

Q. When you were doing the transcript at any time during the time that you were appointed the hearing offi—, the decision maker in that disciplinary, did you have independent conversation with any of the people from the department with regard to testimony or records that were in there? A. Yuh.

Q. You did? A. Yuh. After I read the statements then I asked some people about it.

Q. Within the department? A. Yes.

Q. Did you discuss it with some of the people who were witnesses at the hearing? A. I don't know who were witnesses.

Q. But you discussed within the department, some of— A. Some of the people who had made statements, and I asked them for clarification.

Q. You did. In other words, these people had made—you had read the record and you weren't certain about certain things and then you asked these people who had made the statements to explain— A. Right.

Q. To explain a little further. Okay, as to what had taken place. A. I believe, for an example, if you want me to—

Appendix E

Q. Give me an example. Come on. A. Jim Mattei, who had gone to a doctor because he complained of a shoulder injury, and I asked him to what extent his injury was, whether he was all right. You know. I did ask him about that.

Q. You wanted further clarification as to the extent of his injuries? A. Right.

Q. You don't recall the names of the other people that you may have spoken to? A. No.

Q. But you are certain— A. I know that I spoke to one or two people after having read the thing asking for clarification.

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October Term, 1985

ANGELINA SINICROPI,

Petitioner,

vs.

ROBERT J. BENNETT, as Deputy Director of Probation of the County of Nassau and COUNTY OF NASSAU,

Respondents.

Brief in Opposition to Writ of Certiorari to the New York Court of Appeals, State of New York

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

ANGELINA SINICROPI,

Petitioner,

vs.

ROBERT J. BENNETT, as Deputy Director of Probation of the County of Nassau and COUNTY OF NASSAU,

Respondents.

Brief in Opposition to Writ of Certiorari to the New York Court of Appeals, State of New York.

Opinions Below.

The order of the Supreme Court of the State of New York, County of Nassau, entered September 25, 1984, was not officially reported. The order and decision of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 111 A. D. 2d 801 (2d Dept. 1985). The order of the New York State Court of Appeals dismissed the purported appeal as of right on the appeal of petitioner is not officially reported and is dated October 10, 1985.

Counterstatement of the Case.

On March 21, 1983, the Court affirmed a determination of respondent Bennett that found appellant guilty of certain charges and specifications and terminated her from the service of appellant county. See 92 A. D. 2d 309 (2d Dept. 1983). The New York State Court of Appeals affirmed this Court's order on November 23, 1984 at 60 N. Y. 2d 918 (1983).

Thereafter, during the course of depositions during the prosecutions of multiple civil rights actions, respondent Bennett allegedly admitted that he had discussed the testimony of one witness with him. There was no proof in the record that he discussed testimony with any other witness at the disciplinary hearing.

Thereafter, appellant commenced the within proceeding pursuant to Article 78 of the Civil Practice Law and Rules to annul the determination of respondent Bennett and remand the proceeding to respondent Bennett for a new determination.

This proceeding was commenced by the service of a notice of petition, petition and supporting papers on June 21, 1984. Answering papers were served on August 21, 1984. Reply papers were served on August 22, 1984.

On September 25, 1984, the Hon. Angelo D. Roncallo, Justice of the Supreme Court of the State of New York, County of Nassau, dismissed the petition. Appellant appealed to this Court from said order by notice of appeal dated October 12, 1984.

In an order dated June 10, 1985, the Supreme Court of the State of New York, Second Judicial Department affirmed the order appealed from. The New York State Court of Appeals dismissed the purported appeal as of right on October 10, 1985.

POINT I.

The Court below properly dismissed the petition brought against respondents.

Respondents submit that the Court below properly dismissed the petition herein.

It is the position of appellant that the conduct of respondent Bennett deprived her of her right to a fair determination. Allegedly, respondent considered matters outside the record and has violated her right of due process.

For this proposition, appellant relied on two cases to wit, *Farrell v. Dowling*, 90 A. D. 2d 849 (2d Dept. 1982), app. dism. 58 N. Y. 2d 1112 (1983) and *Multari v. Town of Stony Point*, 99 A. D. 2d 838 (2d Dept. 1984). The clear rationale of these cases is that matter *not raised* at the hearing may not be considered during the adjudicatory process of a civil service proceeding. This type of consideration would clearly violate on employee's right of confrontation and refutation of the materials.

It is clear that the common law rule relied on by appellant is not applicable herein.

The record clearly reflects that respondent Bennett only spoke to one person, James Mattei, about his testimony.

There, the only subject of discussion was the injury sustained by Mr. Mattei as a result of appellant's conduct on August 20, 1978. The fact that Mr. Mattei had suffered an injury was gone into at length at the disciplinary hearing.

That respondents thus submit that the appellant, in this one admitted inquiry, failed to establish that respondent Bennett considered issues not contained in the hearing record. To the contrary, the issue of the injury suffered by Mr. Mattei was explored at the time of the disciplinary hearing.

Additionally, there is no proof in the record that any new material was raised or considered. Thus, there can be no viable claim that respondent Bennett considered matters outside the record of the disciplinary hearing.

Additionally, Mr. Mattei was involved in only one of 13 specifications. As a result, any impropriety would only relate to this one specification and not the other 12.

As a result, any error on the part of respondent Bennett was harmless error. It is clear that the evidence of guilt of appellant is so overwhelming on the other specifications that little would be gained by a remand for another *de novo* determination. *Bigelow v. Board of Trustees*, 98 A. D. 2d 937 (3d Dept. 1983); *Kleinsmith v. Connelie*, 68 A. D. 2d 271 (3d Dept. 1979).

Thus, it is clear that the discussion between respondent Bennett and James Mattei only dealt with the application of the injury testified to at the disciplinary hearing, and not any new matter. As a result, any error herein was at worst harmless and of no moment.

CONCLUSION.

For all the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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